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697-7197



## Department of Defense Instruction ASD(MRA&L)

SUBJECT: Nonappropriated Fund Procurement Policy

- References:
- (a) DoD Instruction 4105.67, subject as above, July 31, 1974 (hereby canceled)
  - (b) Public Law 85-536, July 18, 1958 (Small Business Act of 1953, as amended)
  - (c) DoD Directive 4105.66, "Suspension and Debarment of Nonappropriated Fund Contractors," October 23, 1971
  - (d) Defense Acquisition Regulations (DAR)
  - (e) through (p), see enclosure 1

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### A. REISSUANCE AND PURPOSE

This Instruction reissues reference (a) and prescribes DoD policy for procurements using nonappropriated funds.

### B. APPLICABILITY AND SCOPE

1. The provisions of this Instruction apply to the Office of the Secretary of Defense, the Military Departments, and the Defense Agencies (hereafter referred to as "DoD Components").

2. The policies and guidance contained in this Instruction shall apply to nonappropriated fund procurements accomplished either by nonappropriated or appropriated fund personnel.

### C. DEFINITIONS

The terms used in this Instruction are defined in enclosure 2.

### D. POLICY

1. It is the policy of the Department of Defense that procurement using nonappropriated funds shall be accomplished primarily through competitive negotiation; by trained procurement personnel; in a fair, equitable and impartial manner; and to the best advantage of the applicable nonappropriated fund instrumentality (NAFI). Formal advertising procedures may be used when it can be documented that their use will result in greater advantage to the NAFI.

2. Appropriated fund procurement support for NAFIs is authorized to the extent prescribed by DoD Components.

3. Although the provisions of reference (b) are not applicable to nonappropriated fund procurements, contracting personnel shall ensure that small business and small disadvantaged business concerns are given opportunities to compete for nonappropriated fund requirements.

4. Suspended or debarred firms may not be considered as sources of supply (reference (c)).

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5. Sources of supply in certain foreign countries shall not be used, except in accordance with the Defense Acquisition Regulation (DAR) Section VI, Part 4 (reference (d)).

6. In amplification of DoD policy, the following guidance is provided.

a. Nonappropriated fund procurement shall be accomplished on a competitive basis to the maximum extent practical. Competition shall be obtained from a reasonable number of sources unless single or sole source negotiation is justified as defined by each DoD Component, or as may be required by law.

b. Contracts preferably should be the firm fixed price type.

c. Provisions for economic price adjustment shall be considered for inclusion in the contract when the contracting officer determines current market conditions require such a provision.

d. Goods and services may be purchased through the use of existing contracts (both nonappropriated and, when permitted, appropriated) when a new solicitation, informal investigation of prices, or the examination of the market indicates that the existing contract provides the most advantageous offer available.

e. The DAR (reference (d)) will not apply to nonappropriated fund procurements, except when specifically required by a DoD Directive, DoD Instruction, or by DoD Component regulations. When appropriated funds are involved in a procurement action, the provisions of the DAR shall apply.

f. The Trade Agreements Act of 1979 (reference (e)) is applicable to all purchases made by NAFIs other than purchases of items for resale. DoD Components shall establish necessary procedures to implement the provisions of this Act, to include the quarterly reporting requirements outlined in OFPP Policy letter 80-8 (reference (f)). Interagency Report Control Number 0261-GSA-QU applies.

g. Individuals involved in the buying process shall receive formal instruction in procurement policy and procedures. The levels of formal instruction shall be determined by the DoD Component concerned, and depend upon the scope and complexity of the procurements to be accomplished.

h. Sound cash management principles shall be considered in formulating procurement decisions. Terms of payment shall be set forth clearly. For example, the payment due date or dates may be expressed in number of days after receipt of the contractor's invoice or after receipt and acceptance of goods or services. The contract will designate the nonappropriated fund office where the invoice shall be sent. Discounts will be taken when it is economically beneficial to do so. Accrual of interest on invested money shall be considered before making a withdrawal to make payment for a discount.

i. Procurement shall not be accomplished by the nonappropriated fund custodian, unless the DoD Component has published a directive granting an exception.

(1) Each DoD Component shall specify the conditions under which the exception may be granted.

(2) A centralized nonappropriated fund procurement office or an appropriated fund contracting office shall be used when feasible.

j. All construction in excess of \$10,000 (including minor construction, alteration, and repair) shall be accomplished by the appropriated fund procurement office using formal advertising procedures, unless an exception has been granted by the DoD Component. Construction contracts outside the Continental United States may be accomplished by negotiation (DoD Instructions 1135.10 and 7700.18 (references (g) and (h))). Architectural engineering (A&E) and interior design contracts (except those design projects accomplished in-house) shall be accomplished by negotiation.

k. Key nonappropriated fund personnel and legal counsel, at not lower than installation level, shall meet periodically to discuss means of improving procurement procedures. Representatives from any servicing appropriated fund procurement office shall be invited to these meetings. The following subjects should be considered:

(1) The consolidated procurement of common items used by more than one NAFI;

(2) The assignment of purchasing responsibility to a single NAFI for commonly utilized items;

(3) Comparison of prices paid by each NAFI for the same or similar items;

(4) Sources of supply; and

(5) Related subjects that provide a means of achieving the best advantage for each NAFI.

l. DoD Components shall meet semiannually to discuss the general area of procurement including ways, means, or methods of improving the procurement process to the advantage of all Components. Other related procurement subjects shall be included within the agenda (such as, requirements determination, funding, or vendor performance). Consolidation of like requirements by all DoD installations within a geographical area shall be examined for feasibility by the DoD Components involved.

m. As provided in DoD Instruction 7600.6 (reference (i)), the Defense Contract Audit Agency may be requested to provide audit service to evaluate price proposals when negotiated contracts, estimated at \$100,000 or more, are to be awarded on the basis of cost or pricing data submitted by the offerors, and to the audit of costs incurred under cost reimbursement or incentive type contracts, where the amount to be paid (except for fee or profit) is determined by costs incurred by the contractor.

n. Each contract shall be evidenced by a written document (see section A., enclosure 2).

o. In the selection and acquisition of automatic data processing (ADP) resources, DoD Directives 5100.40 and 7920.1, and DoD Instruction 7902.2 (references (j) through (l)) should be used as guidelines. The existing Military Department ADP selection offices are available for assistance and advice in this area.

#### E. RESPONSIBILITIES

1. Heads of DoD Components shall implement policies and procedures for nonappropriated fund procurement.

2. The Secretaries of the Military Departments may delegate to their respective military exchange services and motion picture services the authority to make those decisions and to take those actions outlined in this Instruction.

3. Overseas commanders shall:

a. Issue modified implementing instructions when policies or procedures are in conflict with status of forces agreements, treaties, or other directives applicable to overseas procurement (DoD Directives 4105.66 and 7060.3, references (b) and (m)).

b. Transmit modified policies or procedures to DoD Component headquarters.

#### F. PROCEDURES

Implementing regulations issued by the DoD Components shall include the following:

1. Contracting Authority. Establish authority for solicitation, negotiation, award, administration of contracts, terminations for convenience and default, determination of protests, and issuance of contracting officer decisions with respect to contract disputes.

2. Contracting Officer. Establish nonappropriated fund contracting officer authority and responsibility.

3. Limitations.

a. Identify the limitations (dollar threshold and types of goods and services) of the contracting officer to issue purchase and delivery orders and contracts without higher level approval.

b. Establish the dollar levels at which successive levels of approvals are necessary.

4. Standards of Conduct. Require all personnel involved in the procurement process to read and comply with the appropriate DoD Component regulation covering standards of conduct required by DoD Directive 5500.7 (reference (n)).

5. Legal Review. Specify the dollar level at which such review shall be accomplished.

6. Contract Formation.

a. Each contract shall identify the contracting NAFI, the contractor, the goods, services, or facilities to be provided, quantities, prices, contract duration, performance requirements, payment terms, and required clauses.

b. Each contract shall identify the contracting fund as a NAFI of the United States and indicate that no appropriated funds of the United States shall become due or be paid a contractor by reason of the contract.

c. As a minimum, each contract shall contain all applicable clauses required by statute, regulation, or directive, such as:

(1) Equal Employment Opportunity (DoD Directive 1100.11, reference (o)).

(2) Disputes, including adequate provision for contractor appeals (this clause may be a simple statement of procedures to settle administrative differences without recourse to law). The Contract Disputes Act of 1978 (reference (p)) is applicable to contracts of military exchanges);

(3) Termination for convenience and default;

(4) Examination of Records Clause for Nonappropriated Fund Contracts (enclosure 3).

7. Contract Documentation. Formats shall be developed for repetitive-type agreements, such as for services, concessions, and entertainment contracts. Each contract file shall document, at a minimum, the following:

a. The requirement for the procurement, sources solicited, proposals received, abstract of offers, required approvals, contractor responsibility, and the contract and award document.

b. A procurement plan and record of negotiations, if applicable.

c. Contracting officer's justification, when award is to other than the low offeror.

d. Poor or unsatisfactory contractor performance.

e. Termination and default actions.

8. Termination/Default Action. Prior to execution, all termination and default actions shall be reviewed by competent procurement personnel and by legal counsel to ascertain the propriety of the action.

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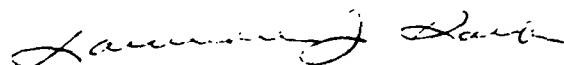
<sup>1</sup>NOTE: Exception to the requirement for disputes and termination clauses is authorized in the case of contracts for commercial bonding and insurance, except when required by law.

9. Petty Cash Purchases. Instructions governing the use of petty cash for small purchases.

10. Emergency Purchases. Procedures to be used and justification for emergency purchases.

G. EFFECTIVE DATE AND IMPLEMENTATION

This Instruction is effective immediately. Forward two copies of implementing documents to the Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics) within 120 days.



— Lawrence J. Korb  
Assistant Secretary of Defense  
(Manpower, Reserve Affairs and Logistics)

Enclosures - 3

1. References
2. Definitions
3. Examination of Records Clause for Nonappropriated Fund Contracts

REFERENCES, continued

- (e) Public Law 96-39, "Trade Agreements Act of 1979," July 26, 1979 (Title III) Executive Order 12260, "Agreement on Government Procurement," December 31, 1980.
- (f) Office of Federal Procurement Policy (OFPP) Policy Letter 80-8, "Establishment of Procurement Data Reporting Requirements to Comply with Public Law 96-39", December 11, 1980<sup>1</sup>
- (g) DoD Instruction 1135.10, "Application of Construction Labor Standards to Nonappropriated Fund Activities," June 27, 1966
- (h) DoD Instruction 7700.18, "Nonappropriated and Privately Funded Construction Projects - Review and Reporting Procedures," July 22, 1981
- (i) DoD Instruction 7600.6, "Audit of Nonappropriated Funds and Related Activities," January 4, 1974
- (j) DoD Directive 5100.40, "Responsibility for the Administration of the Automatic Data Processing Program," August 19, 1975
- (k) DoD Directive 7920.1, "Life Cycle Management of Automated Information Systems (AIS)," October 17, 1978
- (l) DoD Instruction 7920.2, "Major Automated Information Systems Approval Process," October 20, 1978
- (m) DoD Directive 7060.3, "International Balance of Payments Program - Nonappropriated Fund Activities," March 9, 1979
- (n) DoD Directive 5500.7, "Standards of Conduct," January 15, 1977
- (o) DoD Directive 1100.11, "Equal Employment Opportunity Government Contracts", August 9, 1968
- (p) Title 41, United States Code, Sections 601-613; Public Law 95-563, "Contract Disputes Act of 1978," November 1, 1978

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<sup>1</sup>Available at the OFPP, Office of Management and Budget, Washington, D.C.  
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## DEFINITION OF TERMS

### A. Contract

1. An agreement that creates an obligation. The following must be present before a contract is consummated:

- a. Competent parties;
- b. Legal subject matter;
- c. Legal consideration;
- d. Mutuality of agreement; and
- e. Mutuality of obligation.

2. A contract shall be evidenced by a written document (such as, purchase or delivery order, contract form, or other document evidencing the agreement of the parties concerned). The term "contract," as used herein, means all types of agreements and orders, including purchase or delivery orders for the procurement of merchandise, supplies, services, and equipment. It includes amendments and modifications to any of the foregoing.

B. Contractor Responsibility. The contracting officer's determination that the contractor has the financial, technical, productive capability, and satisfactory record of performance to perform the contract. The signing of the contract by the contracting officer constitutes evidence of such a determination. Therefore, the contracting officer must be sure that the foregoing requirements have been met before signing the contract or order. Award shall not be made to any firm, vendor, or contractor listed in the Joint Consolidated List of Debarred, Ineligible, and Suspended Contractors (DoD Directive 4105.66, reference (b)).

C. Custodian/Secretary/Treasurer. An individual appointed by written authority to a post of responsibility and trust to exercise administrative and executive control of a nonappropriated fund and charged with its accountability.

D. Competitive Negotiation. The method of procurement other than formal advertising that permits oral or written solicitation and subsequent discussion on prices, terms, or conditions of the proposed contract to arrive at the best advantage for the NAFI. This method of procurement allows the contracting officer the widest latitude in arriving at a fair and reasonable price and mutually agreed upon contract terms.

E. Formal Advertising. The method of procurement that obtains competitive bids and awards a contract to the responsible bidder whose offer, conforming to the invitation for bids, is the most advantageous to the NAFI, price, and other factors considered.

F. Fixed Price Contract. A contract that provides for specifically identified prices for supplies or services. The prices can be made subject to an upward or downward adjustment by including an economic price adjustment provision in the contract.



G. Goods. All property (including supplies, equipment, and parts) except facilities, land, or interest in land.

H. Nonappropriated Fund Contracting Officer. The person authorized in writing by individual appointment or position designation to execute and administer contracts on behalf of a NAFL or the contracting officer's successor or successors.

I. Nonappropriated Fund Instrumentality (NAFI). An integral DoD organizational entity that performs a government function. It acts in its own name to provide or assist DoD Components in providing morale, welfare, and recreational programs for military personnel and authorized civilians. It is established and maintained individually or jointly by the heads of DoD Components. As a fiscal entity, it maintains custody of and control over its nonappropriated funds. It is also responsible for the exercise of reasonable care to administer prudently, safeguard, preserve, and maintain those appropriated fund resources made available to carry out its function. With its nonappropriated funds, it contributes to the morale, welfare, and recreational programs of other authorized organizational entities. It is not incorporated under the law of any state or the District of Columbia, and it enjoys the legal status of an instrumentality of the United States.

J. Procurement. Includes purchasing, renting, leasing, or otherwise obtaining goods, services, or facilities.

1. It also includes all functions that pertain to the obtaining of supplies and services, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration.

2. It does not include the determination of requirements.

K. Requirement. The identification of goods or services (including quality or performance standards, quantity, and delivery schedule) is the responsibility of the requiring custodian who must also indicate that funds are available to satisfy the obligation incurred by any procurement action.

L. Sources of Supply. Sources of supply are all identifiable potential suppliers. In addition to commercial contracts, established government sources (such as, General Services Administration stores and depots, Federal Prison industries, blind and other severely handicapped workshops, Defense Logistics Agency supply centers, and military commissaries) and other nonappropriated fund sources (such as, Army and Air Force Exchange Service, Navy Resale Services and Support Office, and Marine Corps Exchange System) shall be considered as sources of supply. Nonappropriated funds are authorized to obtain certain items for resale from appropriated fund sources.

EXAMINATION OF RECORDS CLAUSE FOR NONAPPROPRIATED FUND CONTRACTS

A. A standard Examination of Records clause shall be incorporated in all nonappropriated fund contracts in excess of \$10,000, except those with foreign contractors, where precluded by the laws of the country involved or where the Secretary of the Military Department concerned determines that the inclusion of the clause is not in the public interest. The wording of the clause is:

"Examination of Records:

a. This clause is applicable if the amount of this contract exceeds \$10,000, and the contract was entered into by means of negotiation. The contractor agrees that the contracting officer or his duly authorized representative shall have the right to examine and audit the books and records of the contractor directly pertaining to the contract during the period of the contract and until the expiration of 3 years after the final payment under the contract.

b. The contractor agrees to include the clause in a., above, in all subcontracts hereunder that exceed \$10,000."

B. "General Accounting Office" may be substituted for "contracting officer or his duly authorized representative" when the prospective contractor does not accept the standard wording.

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